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87-970

No.

Supreme Court, U.S.
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DEC 10 1987
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD and NANCY HUGHES,

Petitioners,

v.

UNITED VAN LINES, INC.,
and 291 SISSER BROS., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Carmack Amendment to the Revised Interstate Commerce Act preempt common law causes of action?

2. May a court invalidate a clear and unambiguous act of Congress because it finds the Act inconsistent with its interpretation of Congress' intent in enacting a larger statutory scheme?

3. Is the purpose of the Carmack Amendment to expand the common law rights of shippers or to enact uniform Federal guidelines?

4. May a common carrier in interstate commerce materially breach the conract of carriage and then rely on a liability limit contained in the contract of carriage?

5. Is a carrier of household goods in interstate commerce to be held to a standard of strict compliance with applicable Federal regulations or substantial compliance?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD and NANCY HUGHES,

Petitioners,

v.

UNITED VAN LINES, INC.,
and 291 SISSER BROS., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Edward and Nancy Hughes, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 11, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1) is reported in 829 F.2d 1407, the opinion of the trial judge of the United States Dis-

trict Court for the Northern District of Illinois, Eastern Division, (App. 33) was not reported. Both opinions are included in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 11, 1987. This Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §10103—Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. §11707—See Appendix at App. 45.

49 C.F.R. §1056.6(a)—See Appendix at App. 43.

49 C.F.R. §1056.6(b)(11)—See Appendix at App. 43.

49 C.F.R. §1307.201(c)—See Appendix at App. 43.

STATEMENT OF THE CASE

Petitioners, Edward and Nancy Hughes, entrusted all of their personal belongings and household goods to the respondent, United Van Lines, for shipment from Philadelphia to Chicago during the summer of 1982. While making arrangements for the move, Nancy Hughes told United Van Lines she wanted full value protection for her goods. United Van Lines agreed to provide that and told her to write in "$3.00 per pound full value" on an order for service. While standing in the dark near a United Van Lines moving van loaded with the Hughes' goods, the driver secured Ed Hughes' signature on the bill of lading by telling him he was signing an inventory. The bill of lading did not contain a liability limitation, but referred to a full value guarantee by United Van Lines.

Enroutc, the moving van caught fire because it was driven for about 50 miles with a flat tire. A local fire department had to unload the moving van to put the fire out and the driver and his helpers then abandoned the shipment for a time on the side of the highway, where it was exposed to thieves, vandals and rain. The driver and his helpers stole items from the shipment, as did other agents of United Van Lines who were hired to clean up the mess on the highway.

On May 21, 1984, the shippers, Edward and Nancy Hughes (hereinafter Hughes, collectively), filed a complaint against the Defendants, United Van Lines and its local Philadelphia agent, 291 Sisser Bros., common carriers, (hereinafter the carrier, collectively), for the destruction and loss of their personal belongings and household goods while being shipped by the carrier. The complaint, as amended, sounded

in negligence, the Carmack Amendment, breach of contract of insurance, breach of contract of carriage, conversion, intentional misrepresentation, negligent misrepresentation, negligent infliction of emotional distress and wilful and wanton conduct. The carrier filed a general denial, a counterclaim for transportation charges and affirmative defenses.

A bench trial began on July 16, 1985 before Judge Plunkett of the United States District Court for the Northern District of Illinois, Eastern Division. The carrier conceded the circumstances of the loss and did not contest the evidence on damages, but contended that the Carmack Amendment to the Revised Interstate Commerce Act provided the exclusive remedy for Hughes. The carrier further contended its liability for the loss was limited to $1.25 per pound, a figure contained in the bill of lading.

The trial was concluded on July 19, 1985. On March 28, 1986, about eight months later, the District Court entered judgment on behalf of Hughes and against the carrier in the amount of $26,180, limiting the Hughes to a recovery of $3.00 per pound, the figure in the order for service. The District Court further held that the Carmack Amendment to the Revised Interstate Commerce Act preempted common law causes of action and denied recovery on the Hughes' common law counts.

The Hughes moved to amend judgment or for a new trial and that motion was denied on July 11, 1986.

The Hughes appealed the trial court's judgment and denial of the post-trial motion to the Court of Appeals for the Seventh Circuit. That appeal was argued December 11, 1986 and decided September 11, 1987. The Court of Appeals for the Seventh Circuit affirmed the trial court's holding that the Carmack Amendment to the Revised Interstate Commerce Act preempts common law causes of action and further affirmed the trial court's ruling that the carrier had effectively limited its liability to $3.00 per pound.

The statutory basis for the jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division, was a Federal question under the Revised Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, specifically §11707, and diversity of citizenship, 28 U.S.C. §1332.

The statutory basis for the jurisdiction of the United States Court of Appeals for the Seventh Circuit was 28 U.S.C. §1291.

The statutory basis for the jurisdiction of this Court is 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THERE IS A SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL ON THE QUESTION WHETHER THE CARMACK AMENDMENT TO THE REVISED INTERSTATE COMMERCE ACT PREEMPTS COMMON LAW CAUSES OF ACTION.

The Seventh Circuit Court of Appeals has erred in holding that the Carmack Amendment to the Revised Interstate Commerce Act preempts common law causes of action. This is error because the Carmack Amendment specifically provides that common law remedies are preserved. 49 U.S.C. §10103 states:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under other law or at common law.

In contrast to the Seventh Circuit, the Tenth Circuit has specifically held that the Carmack Amendment does not preempt common law causes of action. *Reed v. AAACON Auto Transport, Inc.*, 637 F.2d 1302, 1304 (10th Cir. 1981). Similarly, the Second Circuit has also interpreted the Carmack Amendment as preserving a shipper's full common law rights of action. *AAACON Auto Transport v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648, 654 (2nd Cir. 1976), *cert. denied* 429 U.S. 1042 (1977).

Additionally, the Eighth Circuit has allowed recovery of consequential and special damages implying agreement with the Tenth Circuit. *Caspe v. AAACON Auto Transport, Inc.*, 658 F.2d 613 (8th Cir. 1981). The Ninth Circuit has also indicated that, if presented squarely with the question, it would hold that the Carmack Amendment does not preempt a shipper's common law rights. *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984), *cert. denied* 474 U.S. 863 (1985).

While the Seventh Circuit says that the Sixth Circuit agrees with its ruling, that is not altogether clear. *Marquette Cement Manufacturing Co. v. Louisville and Nashville Railroad Co.*, 406 F.2d 731 (6th Cir. 1969).

A district court in the Third Circuit has issued a thoughtful opinion on the question, including a discussion of the legislative history, and agreed with the Tenth Circuit that the Carmack Amendment does not preempt common law causes of action. *Season-All Industries, Inc. v. Merchant Shippers*, 451 F.Supp. 727, 732 (W.D. Pa. 1978).

Whether or not the Carmack Amendment preempts common law causes of action is an important question to

the many interstate shippers in this country and there is a split of authority among the Federal Circuit Courts of Appeal on that question. This is therefore a question that needs to be resolved by this Court.

II.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS INVALIDATED AN ACT OF CONGRESS BY HOLDING THAT, DESPITE ITS CLEAR AND UNAMBIGUOUS LANGUAGE, 49 U.S.C. §10103 DOES NOT PRESERVE A SHIPPER'S COMMON LAW RIGHTS.

A court may not discover a congressional intent, under the guise of statutory construction, which is contrary to the clear language of the statute itself. *Hall v. The Secretary of Health, Education & Welfare*, 600 F.2d 556, 561 (6th Cir. 1979).

49 U.S.C. §10103 clearly and unambiguously preserves all of the shipper's common law remedies. However, the Seventh Circuit has invalidated this provision by holding the exact opposite.

It is necessary for this Court to review the Seventh Circuit's erroneous holding invalidating a Congressional statute.

The Seventh Circuit invalidated the statute because it held that the purpose of the Carmack Amendment was ". . . to establish uniform federal guidelines designed in part to remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment." (App. 13). The Seventh Circuit advances no authority in support of this interpretation of the Congressional intent. This Court has held that:

> . . . the fact that Congress might have acted with greater clarity or foresight does not give courts a

> *carte blanche* to redraft statutes in an effort to achieve that which Congress has been perceived to have failed to do . . . Nor is the judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result . . . On the contrary, deference to the supremacy of the legislature, as well as recognition that Congressmen typically vote on the language of a bill generally require us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." (citation).

United States v. Locke, 471 U.S. 84, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985).

The Seventh Circuit's holding is directly contrary to the plain language of 49 U.S.C. §10103. The Seventh Circuit's interpretation, without citation to authority, is also contrary to the rule of statutory construction set forth by this Court in the *Locke* case. Furthermore, the Seventh Circuit's interpretation renders the statute invalid because under the Seventh Circuit's interpretation the statute would have no effect and is mere surplusage. Statutes should not be construed as mere surplusage and a court considering the intent of Congress is required to assume that Congress said what it meant and meant what it said. *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 672 (9th Cir. 1978).

It is a familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766, 772 (1980).

III.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS ERRONEOUSLY HELD THAT THE PURPOSE OF THE CARMACK AMENDMENT IS TO ESTABLISH UNIFORM FEDERAL GUIDELINES FOR INTERSTATE SHIPMENTS, WHEN THE PURPOSE IS TO IMPOSE ABSOLUTE LIABILITY ON COMMON CARRIERS FOR LOSS OR DAMAGE TO A SHIPPER'S GOODS.

The Court of Appeals for the Seventh Circuit offers no authority for this purpose and none can be found. The purpose of the Carmack Amendment, as can be found both by contemporaneous remarks of legislators and applicable case law, was to expand a shipper's rights at common law by prohibiting limitations of value and to impose absolute liability on a common carrier for loss of or damage to a shipper's goods. 49 U.S.C. §11707. A reading of the statute will reveal it does not mention establishing uniform federal guidelines.

Furthermore, the Tenth Circuit has held that:

> The Carmack Amendment was not designed as a comprehensive restatement of the law, redefining with encyclopedic breadth and detail all rights and responsibilities of interstate freight shippers and carriers. Rather, the Act confines itself to a statement of the rights of a legal holder of a receipt or bill of lading issued by a carrier upon receiving property for interstate transportation and the responsibilities of a carrier to such holder.

Litvak Meat Co. v. Baker, 446 F.2d 329, 335 (10th Cir. 1971).

The Seventh Circuit has reasoned that, since Congress provided a remedy under the Carmack Amendment and regulated interstate transportation of household goods, Congress must have intended the Carmack Amendment to be the sole remedy. As discussed above, this is con-

trary to the clear language of the statute. Moreover, Congress has regulated other interstate industries, such as aviation and banking, without preempting common law causes of action. That is because federal regulation is not at all inconsistent with allowing common law remedies.

In fact, this is the point of *Adams Express v. Croninger*, 226 U.S. 491, 33 S.Ct. 148 (1913), the principal case relied on by the Seventh Circuit for its holding. *Croninger* held that the Carmack Amendment preempted state *regulation* of interstate commerce, but did not hold that common law causes of action were preempted. The legislative history behind the First Cummins Amendment, Act of March 4, 1915, Ch. 176, §1, 38 STAT. 1196-97, enacted two years after *Croninger*, indicates that it was enacted to overrule *Croninger*, to the extent that it could be read as preempting common law causes of action. *Liability of Common Carriers Under Bills of Lading Before a Subcommittee on Interstate Commerce*, 40 Cong. Rec. 5447, 48 (1914).

Courts throughout the country considering these types of cases have become confused in construing the Carmack Amendment because there is differing authority as to its purpose. The purpose of the Carmack Amendment is an important question that should be decided by this Court.

IV.

THE SEVENTH CIRCUIT ERRONEOUSLY ALLOWED THE CARRIER IN THIS CASE TO RELY ON A LIMITATION OF LIABILITY, EVEN THOUGH THE CARRIER HAD MATERIALLY BREACHED THE CONTRACT OF CARRIAGE.

The carrier in this case has admitted that it abandoned the shipment. The uncontroverted evidence at trial was that the carrier's agents also stole from the shipment.

Abandonment and theft from a shipment are material breaches of a contract of carriage and represent a complete failure of consideration and compel recission of any limitation. *Information Control Corp. v. United Airlines Corp.*, 73 Cal.App.3d 630, 140 Cal.Rptr. 877 (2d Dist. 1977); *Seetapun v. Illinois-California Express, Inc.*, 518 P.2d 885 (Okla. 1973); *Johnson v. Bekins Moving & Storage Co.*, 389 P.2d 109 (Idaho 1963), *cert. denied* 379 U.S. 913 (1964); *Maschinenfabrik Kern A.G. v. Northwest Airlines, Inc.*, 562 F.Supp. 232 (N.D. Ill. 1983).

An argument on this point was presented both to the trial court and to the Court of Appeals for the Seventh Circuit. Both courts ignored the testimony at trial, did not address the question in their opinions, and allowed the carrier to rely on a liability limitation not contained in the contract, even though the carrier admitted material breach. The carrier's conduct in this case is no worse than if the carrier had taken the shipment and dumped it in a river. To allow the carrier to rely on a liability limitation misrepresented in the first place as insurance is a gross injustice. As a matter of basic contract law and sound public policy, this Court should consider this question.

V.

THE SEVENTH CIRCUIT HAS ERRONEOUSLY HELD THAT SUBSTANTIAL COMPLIANCE WITH APPLICABLE FEDERAL REGULATIONS IS ALL THAT IS REQUIRED OF A COMMON CARRIER OF HOUSEHOLD GOODS.

At trial, the Hughes argued that there was no limit to the carrier's liability. The carrier argued its liability was limited to $1.25 per pound. Both the trial court and the Court of Appeals for the Seventh Circuit erroneously found that the liability was limited to $3.00, a figure found in the order for service. However, 49 C.F.R. §1056.6(a) re-

quires that the terms and conditions of the contract be contained in the bill of lading. The $3.00 per pound limit is not contained in the bill of lading and neither the trial court nor the Seventh Circuit advanced any tenet of contract law to justify the limit not found in the contract of carriage. In fact, Federal regulations require that a liability limit must be contained in the bill of lading, which the carrier failed to do. 49 C.F.R. §1056.6(b)(11).

Instead, the Seventh Circuit has adopted a test of substantial compliance with the applicable regulations for a carrier engaged in the interstate transportation of household goods. Contrary to the Seventh Circuit's opinion in this case, the First Circuit has held:

> . . . arrangements limiting liability on the part of interstate carriers is (sic) a carefully defined exception to the general thrust of Section 20(11) [now 49 U.S.C. §11707] of the Interstate Commerce Act placing on the carrier absolute liability for loss or damage of a shipper's goods. Consequently, such arrangements must be carefully scrutinized and where they fail, as in the present case, to fully comply with the provisions of the Carmack Amendment, it is clear they are ineffective to limit a carrier's liability.

Anton v. Greyhound Van Lines, Inc., 591 F.2d 103, 109 (1st Cir. 1978) (emphasis added).

Anton, a case relied on by the trial court and the Seventh Circuit, lists the elements a carrier must prove to limit its liability.

As noted by *Anton*, the general thrust of the Carmack Amendment places absolute liability for actual loss or damage to a shipper's goods on the carrier. Since a liability limitation is a carefully defined exception to the Carmack Amendment, carriers of interstate commerce should be held to strict compliance with applicable federal regulations. The carrier in this case failed to comply with other regulations besides 49 C.F.R. §1056.6. See 49 C.F.R. §1307.201(c).

Whether or not carriers of household goods in interstate commerce are to be held to strict compliance or to the lesser standard of substantial compliance with applicable regulations is an important question that needs to be decided by this Court.

CONCLUSION

The District Court and the Court of Appeals for the Seventh Circuit do not understand the purpose of the Carmack Amendment and have therefore erroneously held that the Carmack Amendment preempts a shipper's common law rights. In doing so, they have invalidated a clear and unambiguous act of Congress and disregarded basic contract law. In addition, they have validated a liability limitation that was misrepresented as insurance in the first instance. In doing so, these courts have departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. The writ should also be granted because of the split in authority among the Federal Circuit Courts of Appeal.

Putting aside an intentional destruction of the shipment, it is difficult to imagine facts more egregious than those in this case. If this decision is allowed to stand, it will send a signal to carriers of household goods across this country that they can get away with *anything*. Such a

result is contrary to the intent of the Congress of the United States.

For the reasons stated, the Petitioners urge that a Writ of Certiorari should be granted to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Dated: December 10, 1987

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2134

EDWARD and NANCY HUGHES,

Plaintiffs-Appellants,

v.

UNITED VAN LINES, INC., and
291 SISSER BROTHERS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 4367—**Paul E. Plunkett**, *Judge.*

ARGUED DECEMBER 11, 1986—DECIDED SEPTEMBER 11, 1987

Before BAUER, *Chief Judge,* and COFFEY and EASTERBROOK, *Circuit Judges.*

COFFEY, *Circuit Judge.* Plaintiffs Edward and Nancy Hughes, brought suit against defendants United Van Lines, Inc. (United) and 291 Sisser Bros., Inc. (Sisser Inc.) to recover the full value of their household goods destroyed by fire while in transit in United's van between New Medford, New Jersey, and Chicago, Illinois. The district court found United had limited its liability with the plaintiffs to $3.00 per pound pursuant to its contract and

awarded plaintiffs $26,180.00[1] and also denied the plaintiffs' state and common law theories of recovery. Plaintiffs appeal the district court's award contending that (1) the district court erred in holding that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 11707, preempted their state and common law theories of recovery; and (2) the district court erroneously found that the defendants properly limited their liability (in this case to $3.00 per pound) under the Carmack Amendment. Thus, the questions on appeal are, whether the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 11707, preempts state and common law remedies; and second, whether the district court erred in holding that the defendants satisfied the conditions necessary to limit their liability under the Carmack Amendment. We affirm on both issues.

I

In the spring of 1982, after accepting a new position, plaintiff Edward Hughes moved his family from Medford, New Jersey, to Chicago, Illinois. Mrs. Hughes initiated the moving arrangements by contacting Larry Haney, a United Van Lines agent who had organized the Hughes' moves on several previous occasions. Haney in turn made arrangements for Sisser Inc., the local United Van Lines subsidiary moving company in New Jersey, to meet with the Hughes to plan their move. Subsequently, Cy Pavliga, a representative of Sisser Inc., met with Mrs. Hughes to arrange the move of their personal belongings and household goods to Illinois. Pavliga conducted a survey of the Hughes' furniture, clothing and other household and personal items and completed the ICC required Estimated

[1] Because the actual weight of the shipment was 17,060 pounds, United's liability to the Plaintiffs, based on $3.00 per pound, equals $51,180. United had, prior to this action, paid Plaintiffs $25,000. See footnote 5 *infra*. Thus, $51,180, less the $25,000 already paid to Plaintiffs, equals $26,180.

Costs of Service Form. Upon completion of this form, the carrier is required to estimate the weight of the shipment while the shipper must choose the level of liability at which he wishes to insure his goods. Pavliga estimated the weight of the Hughes' shipment at 12,000 pounds and discussed with Mrs. Hughes the various levels of carrier liability insurance available. He stated that he also provided Mrs. Hughes with several Interstate Commerce Commission (ICC) prescribed explanatory pamphlets.[2] The pamphlets included information on how the shipper is to declare a value for his goods and the liability the carrier assumes based on that declared value. The pamphlets also recited warnings to the shipper that he "fully understand the maximum liability of the option [the shipper] desire[s] before signing any documents;" and a recommendation that the shipper not transport family heirlooms or small articles of high value. (Defendants Exhibits 3 and 4). Mrs. Hughes then selected the liability package entitled "*Gold Umbrella Protection-Full Value Guarantee*" based on the weight of the shipment at $3.00 per pound.[3] The $3.00

[2] The pamphlets are entitled, *Lost or Damaged Household Goods-Public Acvicory No. 4*, and *Summary of Information for Shippers of Household Goods.*

[3] The "Gold Umbrella" coverage provided:

"FULL VALUE GUARANTEE

UNITED VAN LINES agrees that if there is a loss of or damage to any item or items which are part of the SHIPPER'S household furniture and/or personal effects while in the care, custody and control of UNITED VAN LINES or any of its representatives, UNITED VAN LINES will make the SHIPPER whole by exercising one of the following options for each of those articles so lost or damaged:

A. Pay the current market replacement value, without deductions for depreciation;

B. Pay for full cost of repairs;

C. Replace with like articles.

The SHIPPER MUST declare the value of his/her household furniture and personal effects being shipped with UNITED

(Footnote continued on following page)

per pound is the lowest valuation available under the "full value protection" package for the household goods. Based on the assumption that the household goods weighed 12,000 pounds, Mrs. Hughes ordered $36,000 worth of coverage at $3.00 per pound. Mrs. Hughes signed and kept a copy of the Estimate for Services form, which provided that United's liability was limited to $36,000.

Subsequent to the meeting with Pavliga, Dave Hendershott, a sales coordinator with Sisser Inc., sent Mrs. Hughes the required ICC Order for Service form with a letter stating:

---

[3] *continued*

VAN LINES at a figure of not less than $3 per pound of actual weight or the actual value, whichever is greater. The cost to the shipper for this Gold Umbrella Full Value Guarantee shall be $.75 per $100 of declared value. NOTE: The SHIPPER should declare a realistic value on his/her personal property."

The "Gold Umbrella" plan makes clear that the "full value guarantee" was subject to the shipper's declared value on a per-pound basis. The plan also pointed out that the shipper "should declare a realistic value on his/her personal property." Obviously, coverage of $3.00 per pound on 12,000 pounds of personal property would provide a total coverage of $36,000—far short of the value the Hughes assign to their property destroyed during the move. Thus, the Hughes failed to heed the express warning of the "Gold Umbrella" plan to declare a realistic value on their property. Mrs. Hughes, at her initial meeting with Pavliga, Sisser Inc.'s agent, had tentatively chosen the Gold Umbrella full value protection policy with a maximum replacement value limit of $36,000 ($3.00 per pound, assuming the weight was 12,000 pounds). Following that meeting she called Mr. Haney requesting that he explain the Gold Umbrella "insurance" policy she had tentatively chosen. According to Mrs. Hughes, Mr. Haney said the coverage was "excellent"; however, she failed to inform Mr. Haney that she had also chosen to limit the full value protection policy to $3.00 per pound. Apparently, relying on Mr. Haney's half-informed recommendation, the Hughes later confirmed their choice of full value protection (i.e., replacement cost protection) with a $3.00 per pound liability limitation by declaring that value on the "Order for Service" form.

> "It is necessary to sign in two places and declare a value and return to us in the accompanying envelope. We have shown the desired areas for signing as well as the place for valuation. (We understand that you desire full coverage, minimum $3.00 per pound, which is what you should enter in that area.)"

Mrs. Hughes signed the blanks on the ICC Order for Service form indicating that she had received a summary of the information provided shippers of household goods and declared that the coverage chosen was limited to $3.00 per pound.

In the early morning hours of June 25, 1982, employees of Sisser Inc. completed loading the Hughes' goods in a United moving van. The driver prepared a list of the items loaded which her husband, Ed Hughes, signed. The driver also presented Mr. Hughes with a Uniform Household Goods Bill of Lading and Freight Bill which required the shipper to declare and fill in the blank indicating the valuation rate of the goods shipped and the signature of the shipper. Ed Hughes signed his name in the appropriate space reserved for the shipper's signature, but mistakenly signed his name a second time in the space reserved for the shipper's declared value rate. Thus, because Hughes claims that he mistakenly signed the bill of lading where he was supposed to declare a value for the goods, the Uniform Household Goods Bill of Lading and Freight Bill form failed to expressly state and set forth the shippers' declared value rate for the goods shipped.

Immediately after departing New Jersey, the moving van stopped at a weigh station and recorded the weight of the shipment at 17,060 pounds or 5,060 pounds over the estimate of 12,000 pounds Sisser Inc.'s agent made. While in transit on the Ohio Turnpike, a fire on board the moving van destroyed a substantial portion of the Hughes' shipment. Defendants concede liability for the

loss incurred by the Hughes, but challenge the extent (limitation) of their liability.[4]

On May 21, 1984, the Hughes filed a complaint against the defendants for full replacement cost or $111,848.31 of their personal belongings and household goods damaged or destroyed in the fire. On February 11, 1985, the Hughes amended their complaint to include eight state and common law counts for recovery.[5] The district court determined that the Hughes were entitled to coverage of $51,180.00 ($3.00 per pound x 17,060 lbs.) and entered judgment for the Hughes in that amount, less the $25,000.00 the defendants had already paid, or $26,180.00. In addition, the district court denied plaintiffs' state and common law counts holding that the Carmack Amendment to the Interstate Commerce Act preempted all state and common law theories of recovery. Plaintiffs appeal the district court's holding that their state and common law theories of recovery are preempted by federal law and that their recovery under federal law is limited to $3.00 per pound.

[4] The defendants initially claimed that the Hughes failed to limit their liability to $3.00 per pound because the bill of lading contained no declared value. Therefore, the defendants argued that the Hughes were entitled to recover for the loss at the rate of $1.25 per pound, the default level of coverage that automatically applies where the parties fail to expressly provide otherwise. On this basis, the defendants paid the Hughes $25,000. On appeal, the defendants do not contest the district court's finding that the Hughes did declare a value for their goods of $3.00 per pound.

[5] Hughes' common law counts include: negligence, breach of insurance contract, breach of contract of carriage, conversion, intentional misrepresentation, negligent misrepresentation, and negligent infliction of emotional distress.

II. CARMACK AMENDMENT

The plaintiffs initially argue that the Carmack Amendment[6] does not precmpt existing state and common law remedies and rely upon 49 U.S.C. § 10103 which provides:

> "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

49 U.S.C. § 10103 (Revised Interstate Commerce Act). A federal law may only preempt state and common laws if it can be established that Congress so intended. *Rice v.*

[6] Although the substance of the Carmack Amendment (originally 49 U.S.C. § 20(11)) has been recodified into 49 U.S.C. § 11707, § 10730 and § 10103, these sections are commonly termed the Carmack Amendment.

49 U.S.C. § 11707 states in relevant part:

> "A common carrier . . . subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or bill of lading for property in receipt for transportation. . . . The carrier . . . and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission . . . are liable to the person entitled to under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier (2) the delivering carrier or (3) another carrier over whose line or route the property is transported in the United States . . ."

49 U.S.C. § 10730 states in relevant part:

> "The Interstate Commerce Commission may require or authorize . . . a carrier . . . to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by written agreement, when that value would be reasonable under the circumstances surrounding the transportation."

49 U.S.C. § 10103 states:

> "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). It is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Congress' intent to supersede state law may be evidenced in several ways: preemption may be inferred where Congress has legislated so comprehensively that it has left no room for supplementary state legislation, *Rice v. Santa Fe Elevator Corp.*, *supra*, at 230; further preemption may be inferred where state legislation would impede the very purpose and objectives of Congress as expressed in its legislative enactment. *Hillsborough County v. Automated Medical Laboratories, Inc.*, *supra* at 713.

The United States Supreme Court addressed the preemptive scope of the Carmack Amendment relating to state regulation of carrier liability in *Adams Express Co. v. Croniger*, 226 U.S. 491, 33 S. Ct. 148, 59 L. Ed. 1137 (1913). There, the Court held that:

> "[a]lmost every detail of the subject is covered as completely that there can be no rational doubt that Congress intended to take possession of the subject and supersede all state regulation with reference to it."

Adams v. Croniger, *supra* at 504. Although the issue in *Croniger* was whether the states could regulate carrier liability despite the Carmack Amendment, the Court went further and delineated the preemptive scope of the Carmack Amendment as it relates to the availability of state and common law remedies. The Court stated:

> "But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

> What this court said of § 22 of this act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U.S. 426, is applicable to this contention. It was claimed that that section continued to force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in § 20, that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act.' Again, it was said, of the same clause, in the same case, that it could 'not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.'
>
> To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destory the act itself."

Croniger at 507-08. Plaintiffs argue that to the extent that the holding in *Croniger* preempted state and common law remedies in 1913, that holding was overturned with the First Cummins Amendment adopted by Congress in 1915. Plaintiffs point to the provision in the revised 1915 version of the Carmack Amendment to support their argument that Congress intended to preserve for shippers state and common law remedies. That provision stated:

"Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

In rejecting the plaintiffs' argument, we initially note that the remedy provision cited by the plaintiffs in the First Cummins Amendment (incorporated into the Carmack Amendment) and recodified in § 10103 of the revised Interstate Commerce Act is the very provision the Supreme Court considered in *Croniger*. As mentioned earlier, the Court interpreted this provision as meaning that all state and common law remedies, as of that date, inconsistent with the Carmack Amendment, were preempted. In contrast to the plaintiffs' contention that the First Cummins Amendment was an attempt to overrule the holding in *Croniger* regarding the remedy provision, the First Cummins Amendment added nothing to the Carmack Amendment concerning remedies. Rather, the specific additions include (1) expanding the statute's scope to carriage of goods in adjacent foreign countries, (2) specifically providing that the carriers were liable "for the full actual loss, damage or injury" to property transported (except for property received for transportation where the shipper declares or agrees in writing to a release value for the property), and (3) allowing carriers to require that shippers give them notice of the contents of articles concealed in "wrapping, boxing or other means" in which event the carrier could require the shipper to declare a value thereby limiting carriers' liability. Thus, contrary to the plaintiff's contentions, the First Cummins Amendment addressed issues wholly separate from that of preserving for shippers their state and common law remedies; rather, it addressed the scope of the statute as it applied to the carriage of goods in foreign countries, the scope of the carrier's liability, and notice requirements for "concealed" goods. Furthermore, the Supreme Court has held since *Croniger* that the Carmack Amendment, even with the addition of the First Cummins Amendment, preempts state and common law remedies inconsistent with the federal Act. See *American Railway Express Co. v. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923) ("The law of the United States cannot be evaded by the forms of local practice . . . the limitation of liability was valid, whatever may be the law of the State in cases within its control."). *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357, 41 S. Ct. 114, 65 L. Ed. 301 (1920).

Finally, the majority of circuit courts that have addressed the issue of whether or not state and common law remedies are preempted where goods are damaged or lost in interstate commerce have held that the Carmack Amendment does preempt state and common law remedies based on the *Croniger* decision. See *Air Products & Chemicals, Inc. v. Illinois Central Gulf Railroad Co.*, 721 F.2d 483 (5th Cir. 1983) (". . . the Carmack Amendment, as judicially interpreted, provides an exclusive remedy for a breach of contract of carriage provided by a bill of lading. . ."); *W.D. Lawson & Company v. Penn Central Company*, 456 F.2d 419 (6th Cir. 1972) ("As to the [ ] issue . . . [of] whether or not the Carmack Amendment preempted common law suits . . . we hold that it did"); *R.H. Fulton v. Chicago Rock Island and Pacific Railroad Company*, 481 F.2d 326 (8th Cir. 1973) ("The cases make it clear that when damages are sought against a common carrier for failure to properly perform, or for negligent performance of an interstate contract of carriage, the Carmack Amendment governs" quoting *American Synthetic Rubber Corp. v. Louisville & N.R.R. Co.*, 422 F.2d 462, 468 (6th Cir. 1970)); *George R. Hall, Inc. v. Superior Trucking Co.*, 514 F. Supp. 581 (N.D. Ga. 1981) ("Though the Court is impressed by the reasoning in *Litvak* . . . seventy-five years of judicial interpretation of the Carmack Amendment have now settled the question of the availability of state remedies against a common carrier . . . [u]nder the Carmack Amendment and the judicial decisions interpreting it, plaintiff may only rely on the remedies provided by the bill of lading. . .").

Although the Seventh Circuit has not previously addressed this issue, a district court trial judge in *Wirth v. Silvretta*, 575 F. Supp. 1274 (N.D. Ill. 1984), held that the Carmack Amendment does indeed bar a shipper from seeking any other remedy either state or common law against a carrier for damages to the shipper's goods that have been transferred in interstate commerce. The trial judge stated:

> "Though the court spoke in *Croniger* of the validity of state restrictions on limitation of a carrier's liability, and not squarely on the subject of the continued existence of state common law remedies, we think that the case clearly implies that Congress has shown a purpose to occupy the field of regulating claims for damages to goods shipped interstate. We therefore agree with those courts that have held the Carmack Amendment preempts state common law remedies in the present situation."

Wirth, at 1276-77.

The Tenth Circuit, for some reason unknown, stands alone in not agreeing that the Carmack Amendment preempts a shipper from seeking state and common law remedies against a carrier who has damaged or lost the shipper's goods during interstate transit. See *Reed v. Aaacon Transport, Inc.*, 637 F.2d 1302 (10th Cir. 1981); *Litvak Meat Company v. Baber*, 446 F.2d 329 (10th Cir. 1971); *L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488 (10th Cir. 1964). Plaintiffs rely on these Tenth Circuit cases to support their position.

In *Litvak*, the court addressed the preemption scope of the Carmack Amendment and concluded that although the amendment preempted any state legislation on the same subject, it did not "oust all other remedial rights of the shipper," *Litvak*, at 335.

The court stated:

> "By its very terms the statute did not intend to preempt every cause of action brought by a shipper against a carrier for damage to its interstate shipment.
>
> * * *
>
> [I]ts principal function is to permit a shipper in interstate commerce to bring an action against the initial carrier to recover for damages to the shipment whether such damages occurred while the goods were in the hands of the initial carrier or connecting carrier.
>
> Thus, though the Carmack Amendment allows a shipper to enjoy the elimination of this one element in his burden of proof, it does not compel him to avail himself of the opportunity. The more difficult road of common-law action against a carrier is still open to a shipper wishing to transverse it."

Litvak, 446 F.2d at 335-36.

We note that the Tenth Circuit has not yet been confronted, based on our research, with a situation where the carrier had limited its liability to a declared value. In addition, the facts are unclear in these cases as to whether the shipper's choice of the common law remedy was inconsistent with the federal remedy under the Carmack Amendment. We reject the Tenth Circuit's ambiguous and unexplained narrow ruling that a shipper may elect a common law remedy inconsistent with the Carmack Amendment. The purpose of this statute is to establish uniform federal guidelines designed in part to remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment. To permit a shipper to choose among various types of remedies would cause confusion and insurmountable problems and defeat the Act's purpose of eliminating uncertainty as to a carrier's liability by injecting uncertainty back into this area of transportation Congress has sought to regulate.[7]

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[7] If state remedies were available, imagine the scenario of legal problems that an ingenious lawyer could invent. Consider a situation where a carrier of goods collides with another vehicle at a

(Footnote continued on following page)

We reject the plaintiffs' argument and their reliance on the cases of the Tenth Circuit and hold that the remedy provision of the Carmack Amendment preempts all state and common law remedies inconsistent with the Interstate Commerce Act based on our reading of First Cummins Amendment, its legislative history, the Supreme Court decisions, and the majority of circuit court decisions.

III. LIABILITY LIMITATION

Plaintiffs next contend that even if we hold that the Carmack Amendment preempts state and common law remedies, the defendants, United Van Lines and Sisser Inc., failed to limit their liability under the Carmack Amendment because they failed to comply with the four steps necessary to limit their liability under the Carmack Amendment.

There are four steps a carrier must take to limit its liability under the Carmack Amendment: (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978).

Plaintiffs challenge the findings of the district court that defendants met the latter three of these requirements on the ground that the evidence presented at trial fails to support the findings of the court. Specifically, they challenge the trial court's determination finding that (1) plaintiffs agreed to limit the defendant carrier's liability to

[7] *continued*
state border causing damages to the goods, then skids across the state line, is struck by another vehicle and a fire ensues destroying most of the goods being shipped. Assuming each state has different remedy provisions, which state's statute prevails? In what state was the damage caused to establish liability?

$3.00 per pound; (2) that defendants gave them a reasonable opportunity to choose between two or more levels of liability; and (3) that defendants issued them a valid receipt or bill of lading prior to moving.

Our review will necessarily be limited to whether the district court's findings were clearly erroneous since the appellants' challenge of the district court's finding that United complied with the Carmack Amendment requires us to examine the facts underlying the trial court's decision. *Pullman-Standard v. Swift*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 66 (1982). A finding is clearly erroneous when although there is evidence to support it, if the reviewing court, after considering the entire record, is left with the definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 518 (1985) (quoting from *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 764 (1948)). The question for the appellate court under Rule 52(a) is not whether it would have made the same findings as the trial court, but whether based on the evidence presented it is left with a definite and firm conviction that the trial court erred in its judgment. *United States v. United States Gypsum Co., supra, In the Matter of Fox*, 808 F.2d 552 (7th Cir. 1986). We consider each of these steps separately.

A. ICC-APPROVED TARIFF

The district court found, and plaintiffs do not contest, that United Van Lines maintained a tariff that complied with ICC guidelines at the time of the plaintiffs' move, and therefore, we accept the district court's finding that United's tariff was in compliance with ICC guidelines.

B. SHIPPER'S AGREED CHOICE OF CARRIER LIABILITY

The second step requires that the carrier obtain the shipper's written agreement of his (the shipper's) choice of carrier liability. Plaintiffs argue that the evidence does

not support the district court's finding that the Hughes selected and agreed to value or "insure" their goods for $3.00 per pound. They contend the district court ignored both Mr. Hughes' unrebutted testimony that he unknowingly signed the bill of lading in the dark and Mrs. Hughes' unrebutted testimony that she continually requested full value coverage for her goods. Plaintiffs argue the evidence only supports the conclusion that Sisser Inc. misrepresented to them the extent of coverage and misled them into agreeing to "insure" their goods at $3.00 per pound by not fully explaining the liability limitation in the Gold Umbrella full value protection package. We are certainly sympathetic with their plight, but based upon prior case law and its applicability to the fact situation before the court, we are not persuaded that the district court committed an error in ruling on this issue. See *Sunstream Jet Express, Inc. v. International Air Service Co. Ltd.*, 734 F.2d 1258 (7th Cir. 1984) ("If the contract imports on its face to be a complete expression of the whole agreement, it is presumed that the parties introduced into it every material item, and parole evidence cannot be admitted to add another term to the agreement," (citing *Pecora v. Szabo*, 94 Ill. App.3d 57, 63, 418 N.E.2d 431, 435-36 (1981)).

We are bound by the trial court's finding of fact if upon our review of the entire record the district court's account of the evidence is plausible. The court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be considered clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. at 574, 105 S. Ct. at 1512.

The standard for determining whether a shipper agreed in writing to limit the carrier's liability was discussed in *Chandler v. Aero Mayflower Transit Co., Inc.*, 374 F.2d 129 (4th Cir. 1967). There, the court stated, "Congress no doubt used the words to indicate that a shipper should agree in the same sense that one agrees or assents to

enter into a contractual obligation." *Id.* at 135. See also *New York, N.H. & Hartford R. Co. v. Nothnagle*, 346 U.S. 123, 73 S. Ct. 986 (1953). One who signs a contract in the absence of fraud or deceit cannot avoid it on the grounds that he did not read it or that he took someone else's word as to what it contained. But an agreement signed under the belief that it is an instrument of a different character is void, and the failure to read an instrument is not negligence per se but must be considered in light of all surrounding facts and circumstances. *Chandler, supra* at 136.

Based upon the *Chandler* standard, our review is limited to the question of whether the district court's finding that the plaintiffs knew they were signing a contract for the shipment of their goods was clearly erroneous. We hold that the district court's finding that the Hughes were aware that they were signing a contract for the transportation of their goods was not clearly erroneous.

Evidence was introduced which supports an inference that Mr. Hughes knew he was signing a contract, and was not misled into signing the contract. The record shows that Mr. Hughes was a college-educated, well-traveled businessman. He had shipped his belongings and household goods and items in eleven prior moves, the last three with the defendant United Van Lines or one of its agents. Although this was the first time he had paid for a move himself, Hughes was not completely "in the dark" as to bills of lading. In fact, he does not deny that (1) he was aware that the cost of the move was based on weight and mileage (T. 216); (2) that he could declare a value for his goods (T. 216, 225); and (3) that payment was due after the goods were delivered (T. 200). In addition, Mr. Hughes testified that the papers he signed "were all together, like a contract. . ." and that although he could not read the documents because it was too dark, he could see what was on each sheet and distinguish between the different inventory items (T. 223). The evidence also established that Mr. Hughes was not misled into signing the bill of lading. Mr. Hughes stated and admitted that he hurried-

ly signed the inventory sheets and bill of lading because "everybody was tired and everybody wanted to get on their way"; (T. 188) and readily admits that he did not read the documents thoroughly. (T. 220-21) Based on this evidence, the district court record supports the trial judge's finding that Mr. Hughes knew he was signing a contract for the shipment of his goods, and was not misled into signing the same.

Plaintiffs argue that based on the standard set forth in *Chandler*, the trial court's verdict is not supported by the evidence introduced at trial. We disagree. This case is distinguishable from both *Chandler* and those cases in which the shipper has proven no agreement was made pursuant to the *Chandler* standard. In *Chandler*, the shipper did not sign a bill of lading at the time of the shipment of the goods and further was fraudulently misled by the carrier's agent who told him he was resigning the inventory sheets when in fact he was signing the bill of lading. In addition, the agent compounded the problem by admitting that he had earlier misinformed and misled the shipper into believing that he was fully protected for any kind of loss. Finally, the carrier admitted that he never issued the bill of lading or a copy of it to the shipper. Thus, *Chandler* is clearly distinguishable from this case.

In contrast to the Hughes, the shipper in *Fireman's Fund Insurance Co. v. Barnas Electric, Inc.*, 590 F. Supp. 640 (N.D. Ind. 1982), the shipper had a very limited understanding of the English language, and although the agent was aware of both the language limitation and the valuable nature of the goods being transported, the agent filled out the air bill (bill of lading) himself without advising and explaining to the shipper the different types of liability coverage available to the shipper. In addition, the shipper testified that the agent filled out what he understood to be a "questionnaire," and that he was unaware that he had signed a contract.

There is testimony in the record upon which the district court could very well have concluded that Mrs. Hughes

was not misled into choosing a $3.00 per pound liability limitation. Mr. Pavliga, Sisser Inc.'s agent, testified that he had in fact explained each level of liability coverage available to Mrs. Hughes and that he made only a recommendation as to what level of coverage to choose. He also testified that he gave Mrs. Hughes several ICC required pamphlets which explain to shippers the types of valuation ("insurance") available and the extent of coverage for each level. Furthermore, Mrs. Hughes admits she called Larry Haney after discussing the $3.00 per pound full value package with a Sisser Inc. agent and relied upon Haney's recommendation to purchase the Gold Umbrella full value package without discussing with him the extent of her coverage. (See footnote 3, *supra.*) Based on the entire record, the district court's finding that the plaintiffs were not misled into agreeing to limit defendant's liability to $3.00 per pound was not clearly erroneous.

Plaintiffs, as a back-up position, offer an alternative theory for challenging the district court's finding that they agreed to insure their goods for $3.00 per pound rather than, as they contend, insure for the full $111,848.31. They argue that because Mrs. Hughes was unilaterally mistaken about the terms of the contract, there was no agreement, and therefore there is no contract because of lack of mutual understanding of terms and the contract is therefore void. Plaintiffs raise this argument in response to the district court's holding which stated in relevant part:

> "It may be that Mrs. Hughes misunderstood her conversation with Mr. Pavliga. She may have incorrectly perceived that she was obtaining full value coverage for her household goods which would be paid to her in the event of loss and that such full value coverage was available in return for a premium payment of $3.00 per pound. However, a unilateral mistake by Mrs. Hughes as to the amount of her coverage is not a valid basis to vitiate a liability limitation. *Cf. Feinberg v. Railway Express Agency*, 163 F.2d 998 (7th Cir.), *cert. denied*, 332 U.S. 847 (1948)."

To challenge this, plaintiffs rely on *Gammel Mfg. Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983), where the appellate court held that a unilateral mistake may void a contract in limited circumstances pursuant to the *Restatement (Second) of Contracts* § 153(a) (1981). The rule states:

> "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if [he does not bear the risk under § 154 and] . . .
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake."

We reject the plaintiffs' novel and self-serving argument. The law with regard to voiding the effect of a signature on an ambiguous contract due to unilateral mistake is clear. In the absence of fraud, the consent evidenced by a signature may be voided only if two requirements are met. They are (1) the shipper did not know at the time he signed the papers that they were in fact contractual documents; and (2) shipper's failure to read the document and ascertain their true nature was excusable under all of the circumstances (i.e., the shipper acted as a person of ordinary prudence would have acted in the circumstances). *Chandler, supra* at 136-37.

Similarly, once the shipper was aware that the document signed was a contract for transporting his goods, absent fraud or bad faith, the shipper cannot reform the bill of lading without the consent of the carrier on the grounds that they were unilaterally mistaken about the terms of the contract. See *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261 (8th Cir. 1984) ("[shipper's] mistake was unilateral and therefore may not be the basis for reformation of the contract [without the carrier's approval]."); *Thomas v. Transworld Airlines, Inc.*,

457 F.2d 1053 (3rd Cir. 1972) ("[W]hen no question of fraud, bad faith or inequitable conduct is involved and the right to reform an instrument is based solely on mistake, it is necessary that the mistake be mutual. . . . Mere failure to read an instrument, thus giving rise to plaintiff's unilateral mistake, is insufficient to obtain relief.")

As we stated earlier, we hold that there is more than sufficient evidence to support the trial court's finding that the plaintiffs knew at the time of signing the document that they were signing a contract for transportation of their goods. The "Order for Service" form Mrs. Hughes signed was a formal document which included the estimated cost, notice to the shipper to declare a value for the goods, two places for the shipper's signature, and a host of information regarding the move. Mrs. Hughes also testified that she did not read the Full Value Guarantee information provided with the Order for Service form. (T. 133, 151).

Likewise, taking Ed Hughes' (an experienced mover) testimony at face value that he was not aware that he was signing a contract when he signed the inventory sheets and the bill of lading prior to shipment, it was his fault for not reading the bill of lading. A reasonable, prudent person in those circumstances, particularly one as experienced as Mr. Hughes, and one with a college education, would have have taken the time to read and understand the bill of lading in its entirety.

Plaintiffs rely on the Restatement of Contracts (Second) § 153 and the application of that section in *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983), to support their position that no contract existed because of the Hughes' unilateral mistake. The Restatement section simply is not appropriate in this situation because its application has been limited to circumstances where a party settles a cause of action based on a unilateral mistake. *Gamewell* involved a patent infringement action where one party attempted to rescind a settlement agreement after mistakenly relying on false information about their product. The court limited its

discussion to cases where one party sought to rescind a settlement agreement. Thus, this principal has been narrowly applied only to cases involving settlement agreements. In addition, plaintiffs are unable to cite any language in the cases where the court has even considered adopting this rule of unilateral mistake in contract for carriage cases.

Based on the well established law in contract for carriage cases and the very narrow application of the unilateral mistake principal to cases involving settlement agreements, we reject the plaintiffs' argument that the signature on the bill of lading may be voided if the signing party was unilaterally mistaken about the terms of the contract, and we hold that the defendants satisfied the second requirement under the Carmack Amendment by agreeing in writing with the plaintiffs to limit their liability to $3.00 per pound.

C. SHIPPER'S FAIR OPPORTUNITY TO CHOOSE THE CARRIER'S LIABILITY

The third step a carrier must take to limit its liability under the Carmack Amendment requires that a shipper be given a fair opportunity to choose between a higher liability level and a lower liability level. A fair opportunity means that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice. *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), *Quasaar Company v. Atchison, Topeka and Santa Fe Railway Company*, 632 F. Supp. 1106 (N.D. Ill. 1986). In addition, any limitation of liability must be brought to the attention of the shipper before the contract is signed, and the shipper must be given a choice to contract, with or without, the limitation of liability in the movement of his goods. *Chandler v. Aero Mayflower Moving Co., supra*, at 137.

The district court rejected the plaintiffs' argument that they were not given a reasonable and fair opportunity to

exercise their right to choose between alternative levels of coverage. The court stated:

> "[The evidence shows that United's] instructions to Mrs. Hughes (to fill in the $3.00 per pound liability limitation on the Order for Service Form) was based on Mrs. Hughes' conversation with [the United Agent]. Mrs. Hughes, not [United], selected the liability limitation which governed the contract between parties."

Plaintiffs argue that the evidence does not support the district court's finding because they allege that the trial court ignored the testimony of the Hughes that they were misled into signing a contract that limited their coverage to $3.00 per pound on lost and damaged goods. We disagree since the determination of whether the Hughes were given a fair opportunity to choose between different levels of liability is a question of witness credibility, and it cannot be said the trial court erred in giving more weight to the testimony of the defendants' witness than to the testimony of the plaintiffs. Once again, we emphasize that the standard of review on appeal under Rule 52 is very narrow. When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor including but not limited to the actions, mannerisms, and facial expressions that bear so heavily on the listener's understanding of and belief in what is said. *Wainwright v. Witt*, 105 S. Ct. 844 (1985). When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. *Anderson v. City of Bessemer City, N.C., supra* at 1513.

Applying this standard, we conclude that based on a review of the entire record, the trial court could very well have found that the Hughes were intelligent and experi-

enced movers, received adequate information from both Mr. Pavliga and the informational pamphlets about the extent of coverage available and the specific terms of each type of coverage. Plaintiffs rely on *Allied Van Lines, Inc. v. McKnab*, 351 So. 2d 344 (Fla. 1977), to support their position that Mrs. Hughes was not given a fair opportunity to choose between the higher and lower levels of liability. They argue that, like the shippers in *McKnab*, the fact that the carrier (United) filled in the value on the bill of lading rather than the shipper is evidence that the carrier had misled them about the extent of their liability coverage.[8] But in *McKnab*, the trial court found that the shipper had in fact been misled by the carrier agent as to the available coverage and was prevented from choosing adequate coverage. In contrast, the district court here found that Mrs. Hughes was not misled about the types of liability coverage available to them. The district court quite emphatically stated that, "the evidence in this case is devoid of any fact or inference to suggest that United attempted in any way to mislead plaintiffs." Unlike the circumstances in *McKnab*, the plaintiffs here, were given several opportunities to familiarize themselves with the nature of their coverage and *seek an explanation if they had any questions*. Instead, the plaintiffs allegedly relied upon Mr. Haney's explanation of the coverage without completely informing him of the type of full value coverage they had chosen. Thus, based on the entire record which establishes that the Hughes (1) discussed the different types of liability coverage with Mr. Pavliga; (2) chose the Gold Umbrella full value protection with a replacement value limitation of $3.00 per pound; (3) were given informational pamphlets explaining the liability limitations associated with the different rates a shipper could declare for his goods; (4) had opportunities to call Sisser, Inc. about any misunderstanding they had about their liability coverage; (5) signed the "Order for Service" form voluntarily declaring the valuation rate to be $3.00 per pound; and (6) were seasoned shippers of goods (11 times), we hold the district court's finding that the plaintiffs were given a fair opportunity to choose between alternative levels of coverage was not clearly erroneous.

[8] The record indicated that on a copy of the bill of lading United had inserted the previously agreed upon declared value of $3.00 per pound.

D. PROVIDING THE SHIPPER WITH A BILL OF LADING

The fourth step a carrier must take in order to limit its liability under the Carmack Amendment is to provide the shipper with a receipt or bill of lading before transporting his goods. Although plaintiffs acknowledge receiving a receipt or bill of lading, they argue the bill of lading is void because it did not comply with federal regulations. Plaintiffs argue the bill of lading is defective in three ways. First, the bill of lading had no release value written on it as required by 49 C.F.R. § 1056.6(a) and § 1056.6(b)(11); second, the carrier, rather than the shipper, typed in its claimed liability limitation in violation of 49 C.F.R. § 1307.201(c); and third, the limiting language in the bill of lading was neither distinctively colored nor in bold face type as required by 49 C.F.R. § 1307.201(c).

Plaintiffs initially argue that because the only figure written on the bill of lading was an ambiguous reference to "Full Value Guarantee" any liability limitation is void pursuant to 49 C.F.R. § 1056.6(a) and § 1056.6(b)(11). Plaintiffs obviously ignore the fact that the absence of a declared value on the bill of lading is the result of Mr. Hughes' failure to insert the value of their goods. Instead of inserting in the space provided the $3.00 per pound value, Mr. Hughes mistakenly signed his name there. There was nothing ambiguous about the bill of lading since it provided two distinct printed warnings to the experienced shipper instructing him where to declare the value of his goods and the consequences of his or her failure to properly insert the amount of coverage desired in the space provided would result in limiting the carrier's liabil-

ity to $1.25 per pound. Although it was early morning when Mr. Hughes signed the bill of lading, he admitted his carelessness in that he made no attempt to read the provision of the contract, and that he was tired and everybody wanted to get on with the move. We know of no case law nor has any been provided to us holding that United has an obligation to ensure that the shipper reads the bill of lading carefully. It was Mr. Hughes' responsibility, an experienced mover, to read the bill of lading carefully, and question anything he did not understand. His careless and negligent failure to do so, however, is not grounds for voiding the limitation.

Plaintiffs next argue that the bill of lading is invalid because the carrier, rather than the shipper, typed in its claimed liability limitation on the bill of lading in violation of 49 C.F.R. § 1307.201(c). They cite *Brannon v. Smith Dray Line & Storage Co., Inc.*, 456 F.2d 260 (6th Cir. 1972), to support their argument. The regulation states that:

> (c) *Statement on bills of lading.* The bill of lading . . . shall have printed . . . a statement reading as follows:
>
> NOTICE: The shipper signing this contract must insert in the space above, in his own handwriting, either his declaration of the actual value of the shipment. . . .

49 C.F.R. § 1307.201(c).

The purpose of requiring that the shipper, rather than the carrier, fill in the declared value of the goods is to assure that the shipper makes a deliberate and well-informed choice to the valuation of their goods. In *Brannon*, unlike this case, the district court found the shipper was not given a fair opportunity to make such choice. There, the district court made findings of fact that the shipper had not been given a copy of the written cost estimate before or after she signed the contract, nor was she given a copy of the *Notice to Shippers of Household Goods* as required by the Interstate Commerce Commission to be furnished to all prospective shippers of household goods in interstate commerce. Also, the carrier's agent did not adequately advise the shipper concerning her opportunity to choose a range of valuation while assuring her that the rate he suggested would afford her sufficient coverage. It was based on these findings that the court of appeals stated:

> "In light of these findings, together with the fact that the carrier had typed in the valuation figure on the bill of lading rather than allowing the shipper to write that figure herself as provided in the printed instructions for completion of the document, the court held that the shipper was not bound by this valuation. . . ."

Brannon at 261. Thus, the significance of the fact that in *Brannon* the carrier, rather than the shipper, typed in the valuation figure on the bill of lading is dependant upon the surrounding circumstances and only significant when the shipper is not adequately advised concerning the shipper's opportunity to declare a value for his or her goods. In this case, unlike *Brannon*, it is not very significant. Since, as the district court found, the defendants clearly informed Mrs. Hughes of the alternative levels of liability based on her meeting with Mr. Pavliga and the ICC informational pamphlets she received from the defendants. In addition, the district court found, and we agree based on our review of the record, that Mrs. Hughes made a deliberate and well-informed choice to limit coverage to the $3.00 per pound level of coverage after her meeting and conversation with Mr. Pavliga. She then declared the value, in writing, on the Order for Service Form after the Hughes had an opportunity to read the informational pamphlets and discuss the coverage with a United agent. Instead, Mrs. Hughes states that she apparently mistakenly relied upon Mr. Haney's half-informed recommendation that they contract for the "Full Value Guarantee" package (see footnote 3, *supra*). Based on the fact that the Hughes (1) discussed the different types of liability coverage with Mr. Pavliga; (2) chose the Gold Um-

brella full value protection with a replacement value limitation of $3.00 per pound; (3) were given informational pamphlets explaining the liability limitations associated with the different rates a shipper could declare for his goods; (4) had opportunities to call Sisser, Inc. about any misunderstanding they had about their liability coverage; (5) signed the "Order for Service" form voluntarily declaring the valuation rate to be $3.00 per pound; and (6) were seasoned shippers of goods (11 times), the Hughes' argument that the shipper's inclusion of the $3.00 per pound liability rate on the bill of lading evidences its intent to mislead the Hughes about the extent of their coverage is simply not valid. United filled in the $3.00 per pound liability rate on the bill of lading after the Hughes had clearly chosen that value and was merely confirming what the plaintiffs had earlier decided.

Plaintiffs', grasping one last straw, argue that United failed to strictly comply with its tariff instructions and federal regulations because the limiting language in its bill of lading was neither distinctively colored nor in boldface type is unpersuasive. 49 C.F.R. § 1307.201(c) states in relevant part:

> "(c) *Statement on bills of lading.* The bill of lading issued for any accepted for transportation . . . shall have printed in distinctive color in boldface type on the face thereof. . . ."

49 C.F.R. § 1307.201(c). Once again, plaintiffs' argument that the bill of lading is void because the warnings were not sufficiently distinct on the face of the contract is too formalistic. The limiting language in the bill of lading was sufficiently distinct in color and type. It gave two warnings to the plaintiffs that they must insert their declaration of the actual value ~~of the~~ shipment. The bill of lading sufficiently informed plaintiffs of their duty to complete the instrument, and warned them of the consequences if they failed to declare a release value.

Plaintiffs cite *Caspe v. Aaacon Auto Transport, Inc.*, 658 F.2d 613 (8th Cir. 1981), to support their position that

failure to strictly comply with the tariff and federal regulations voids any liability limitation in the bill of lading. In *Caspe*, although the trial court held that the carrier's failure to fully comply with its tariff and ICC order made void the limitation clause in the bill of lading, the court of appeal's real concern focused on the carrier's failure to inform the shipper of the limitation clause. The circuit court of appeals stated:

> "It seems obvious that the purpose of putting a limitation clause in bold-face type is to make it stand out and attract the reader's attention. It seems equally obvious that putting the entire agreement in densely packed bold-face type, such as Aaacon did, with the limitation clause buried in the middle of the agreement, does not achieve that purpose. Additionally, Aaacon's agreement provided no space for shipper to declare the value of the property, as is contemplated by the tariff and order, and which would be a further means of attracting the shipper's attention by causing him to focus on the value of the shipment."

In this case, defendants orally and in writing informed plaintiffs of the limitation provisions in the contract, and gave them ample opportunity to review, question, understand and, if need be, question the consequences of the liability limitations if they were not satisfied with Mr. Pavliga's explanation. Defendants supplied Hughes with information about the Full Value Guarantee package (Defendants' Ex. 11), ICC required informational pamphlets (Defendants' Ex. 3 and 4) which explains to the shipper the procedures and consequences of declaring a value for the shipper's goods; and a bill of lading which contained distinctly colored warnings in bold-face type about declaring a value for the goods shipped. Despite the fact that they are experienced movers whose three previous moves were with United, the plaintiffs failed to read all the documents United provided to them.

This same concern of strict compliance with tariff and ICC regulations was recently addressed in *Robinson v. Ralph G. Smith, Inc.*, 735 F.2d 186 (6th Cir. 1986) where the court of appeals held that substantial compliance with the ICC tariff requirements in a carrier's bill of lading form was sufficient to limit a carrier's liability. In reviewing the bill of lading the court stated:

> "The language in the limitation clauses of both the tariff and the bill of lading is similar and conveys the same meaning. Furthermore, the limitation clause of the bill of lading is eyecatching in that it is set out in a separate paragraph and all in capital letters, enhancing the probability that it will be seen by the shipper, and ample space is provided for the shipper to write his own estimate of the value of the animal to be shipped."

Robinson, at 190. The rationale for that decision was that the purpose of the regulation was to encourage competition by allowing shippers to choose for themselves the amounts of "insurance" they wish to cover a shipped article, and to reduce unnecessary federal regulation. Based on this policy, the court stated, "This legislation will best be served by the adoption of a substantial compliance rule." *Robinson, Id.*

Although we need not determine whether to adopt a substantial compliance rule in this instance, based on the existing case law and our review of the facts in this case, we reject the plaintiffs' argument that United's liability limitation is void because the bill of lading fails to strictly comply with United's tariff and ICC regulations because defendants did inform Hughes on several occasions of the nature of the liability limitations, thus satisfying the purpose for the distinct warnings on the bill of lading. We hold that defendants' bill of lading complied with federal regulations by distinctly highlighting the warnings and providing the Hughes with a fair and reasonable opportunity to declare a value for their goods on the bill of lading. The plaintiffs were provided a valid bill of lading

prior to transporting their goods, and therefore United successfully limited its liability under the Carmack Amendment to $3.00 per pound.

IV

In summary, we hold that the district court's action was proper in holding that the proper interpretation of the Carmack Amendment to the Interstate Commerce Act (recodified 49 U.S.C. § 11707, § 10730, and § 10103) preempts all state and common law remedies inconsistent with the Interstate Commerce Act. We also hold that the district court's finding that defendants satisfied all four requirements needed to limit their liability under the bill of lading was not clearly erroneous, and thus the district court's decision to award plaintiffs $26,180 while denying all other claims. Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 11, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

EDWARD and NANCY HUGHES,

Plaintiffs-Appellants,

No. 86-2134 v.

UNITED VAN LINES, INC., and
291 SISSER BROS., INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84-C-4367—**Paul E. Plunkett,** *Judge.*

This case was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD HUGHES and NANCY HUGHES,

Plaintiffs,

v.

UNITED VAN LINES, INC., and
291 SISSER BROS., INC.,

Defendants.

No. 84 C 4367
Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Edward and Nancy Hughes ("Plaintiffs") have brought this action against Defendants United Van Lines, Inc. ("United") and 291 Sisser Bros., Inc. ("Sisser") (collectively "Defendants") claiming that Defendants are responsible for the destruction of all of their furniture and other household goods during a move from Medford, New Jersey to Chicago, Illinois. United is a common carrier and Sisser is its local agent. Both Defendants contracted with Plaintiffs to move their household goods to Chicago. Plaintiffs seek damages in excess of $200,000 in compensatory and punitive damages on eight different common law theories including breach of contract, negligence and misrepresentation. Plaintiffs also seek recovery in Count II on the basis of the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §11707. Jurisdiction rests on diversity of citizenship, 28 U.S.C. §1332, and the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* and is not disputed. The trial was conducted by this court without a jury.

Facts

Edward Hughes accepted a coaching position with the Chicago Bears Football Club in the spring of 1982. Since he was then living in Medford, New Jersey, he was required to move his family and his household goods to Chicago.

Nancy Hughes, the wife of Edward Hughes, initiated the arrangements for the move of the Hughes' household goods to Chicago. Mrs. Hughes spoke with a Larry Haney, an employee of United who had helped Plaintiffs with several earlier moves. United is a Missouri corporation engaged in the business of a common carrier of household goods and other commodities in interstate commerce under authority of a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission. United conducts most of its business through extensive agency arrangements with local agents throughout the United States.

Mr. Haney recommended that Nancy Hughes call Sisser, the local agent for United in the New Jersey area. As a result of that contact, Mr. Pavliga, an employee of Sisser, met with Nancy Hughes at her home in New Jersey. Mr. Pavliga conducted a survey of Plaintiffs' household goods and discussed various facets of Plaintiffs' expected move to Chicago. Mr. Pavliga gave Mrs. Hughes various ICC prescribed explanatory pamphlets (Defendants' Exhibits 3 and 4). Those pamphlets explained the various ways in which shippers such as Plaintiffs may protect their household goods against loss during transit. Mr. Pavliga also completed an ICC prescribed estimated cost of services form (Plaintiffs' Exhibit 1) and reviewed that document with Mrs. Hughes. Mr. Pavliga discussed with Mrs. Hughes the valuation sections of the estimate form relating to the shippers' declared value of the shipment and the various levels of carrier liability which she could select to protect her goods. After learning that Mr. Pavliga estimated the total weight of her goods at 12,000 pounds, Mrs. Hughes selected "full value protection" for her goods based on

the estimated weight of the shipment (12,000 pounds) at $3.00 per pound. The $3.00 per pound is the lowest valuation for which the "full value protection" was available. In other words, Mrs. Hughes ordered protection of $36,000 for her household goods based on the assumption that her household goods amounted to 12,000 pounds. Mrs. Hughes signed the estimate and kept a copy of it.

Sometime thereafter, Mrs. Hughes contacted Sisser and advised that she and her husband had selected United to handle the move. Dave Hendershott, a sales coordinator for Sisser, then prepared an ICC order for service form (Plaintiffs' Exhibit 2B) which was sent to Plaintiffs together with a short letter from Mr. Hendershott which stated, in pertinent part, as follows:

> It is necessary to sign in two places and declare a value and return to us in the accompanying envelope. We have shown the desired areas for signing as well as the place for valuation (we understand that you desire full value coverage, minimum $3.00 per lb., which is what you should enter in that area).

Mrs. Hughes, on the order for service form, signed the blank indicating that she had received summary of information for the shippers of household goods. She also wrote, in a second blank, a valuation for her household goods "not exceeding $3.00 per pound full value." United had estimated the charge for the move, including payment for the cost of liability for loss, at $3,625.90. Mrs. Hughes then returned the order for service form to United which arranged for the shipment of her goods on June 25, 1982. At the time of the actual shipment of the goods, Mr. Hughes received and signed a Uniform Household Goods bill of lading (Plaintiffs' Exhibit 4A). The bill of lading form also contained an area in which Mr. Hughes should have written the actual value of his shipment. However, Mr. Hughes signed his name in the blank provided for the valuation and then signed his name again accepting the valuation. In other words, no amount of valuation appears on the bill of lading.

After leaving Plaintiffs' residence, the driver of the van proceeded to a truck scale where the shipment was weighed. The actual tariff weight of the shipment was 17,060 pounds rather than the estimated weight given by Mr. Pavliga of 12,000 pounds. Since the liability of the carrier was based upon $3.00 per pound, the carrier's maximum liability on the shipment increased from $36,000 to $51,180.

While Plaintiffs' goods were in transit, a fire occurred on the moving van and a substantial portion of Plaintiffs' shipment was damaged or destroyed. United made arrangements to have the items which were salvageable taken to a Chicago warehouse where they were inspected by Plaintiffs. Only a few items originally sent by Plaintiffs from New Jersey were delivered in an undamaged condition to Chicago.

Thus, the evidence adduced at trial clearly established that:

a. The Defendants were hired as common carriers to transport Plaintiffs' property in interstate commerce; and

b. The Plaintiffs' property was nearly completely destroyed while in the care of Defendants.

It is clear that Defendants are liable for a loss incurred by Plaintiffs and Defendants have conceded as much. The issue in the case is the nature and extent of Defendants' liability.

Defendants contend that their liability to Plaintiffs is governed and limited by the Carmack Amendment. Under that theory, when Defendants have complied with all the requirements of that statute, their liability cannot exceed the amount of the liability limitation contained in their contract with Plaintiffs—namely, three dollars per pound. Since the actual weight of the shipment is agreed to be 17,060 pounds, Defendants' maximum liability is $51,180.00.

Plaintiffs contend that the Carmack Amendment does not preempt existing state law remedies and point to 49 U.S.C. §10103 which provides:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

Thus, we must first determine if the Carmack Amendment to the Interstate Commerce Act preempts all state common law remedies for contract or tort.

The Carmack Amendment permits carriers to limit their liability to shippers if they comply with the following four requirements:

1. maintain approved tariff rates with the ICC;
2. obtain a shipper's written declaration of the value to which the property is limited;
3. give the shipper a reasonable opportunity to choose between two or more levels of liability; and
4. issue a receipt or bill of lading prior to moving the shipment.

49 U.S.C. §11707, *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103, 107 (1st Cir. 1978).

The Carmack Amendment was enacted by Congress for the purpose of providing uniform treatment of common carriers in interstate commerce and to avoid the vagaries arising from regulations and policies by the different states. In *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913), the Supreme Court held that the Carmack Amendment superseded all regulations and policies of a particular state. However, the court did not specifically address the issue of preemption of common law remedies but only attempted state regulation. Since *Croninger*, however, numerous circuits have held that the rationale of the *Croninger* decision applies to state remedies as well as state regulation. *See, e.g., Fulton v. Chicago Rock Island Pacific R.R. Co.*, 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973); *W.D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419, 421-423 (6th Cir. 1972). Only the Tenth Circuit in *Litvak Meat Co. v. Baker*, 446 F.2d 329, 335 (10th Cir. 1971), reached a contrary result. The Seventh

Circuit has not addressed the issue of whether the Carmack Amendment preempts common law actions for damage to interstate shipments. However, given the approach of that court in *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), in holding that rights defined by tariff cannot be enlarged or changed by either the tort or contract of the carrier, we believe that our circuit would follow the majority of the circuits in finding preemption of the state common law remedies. In this regard we agree with the reasoning of Judge Marshall in *Wirth, Ltd. v. Silvretta*, 575 F. Supp. 1274, 1276 (N.D. Ill. 1984):

> Though the Court spoke in *Croninger* of the validity of state restrictions on limitation of a carrier's liability, and not squarely on the subject of the continued existence of state common law remedies, we think the case clearly implies that Congress has shown a purpose to occupy the field of regulating claims for damages to goods shipped interstate.

Judge Marshall explained that the statutory provision providing common law remedies (49 U.S.C. §10103) did not affect his conclusion since a nearly identical provision had not affected the Supreme Court's holding in *Croninger*, 226 U.S. at 567-568.

Even given our conclusion that the Carmack Amendment preempts state common law remedies, we must still determine whether Defendants complied with the four requirements of the statute which brings them under the protection of that Act.

It is clear that Defendants filed and maintained an approved tariff during the time of Plaintiffs' move (Defendants' Exhibit 29). It is also clear that United obtained the shippers' written declaration of value. Mrs. Hughes herself filled out and signed Defendants' order for services form. She declared the value to be "$3.00 per pound full value." Plaintiffs were also given a reasonable opportunity to choose between two or more levels of liability. Mr. Pavliga gave Mrs. Hughes documents containing a

discussion of this very subject and Mrs. Hughes acknowledged the receipt of that information on the order for service form. Finally, Mr. Hughes signed the bill of lading prior to moving the shipment, although Mr. Hughes did not fill in the amount of liability the shipper agreed to undertake for his household goods. Thus, since 17,060 pounds were shipped and both United and Plaintiffs agreed to a $3.00 per pound valuation, United is liable to Plaintiffs for $51,180.

Plaintiffs argue, however, that United did not comply with all four requirements to limit their liability. First, they point to the fact that a shipper is not bound by a liability limitation if he was induced not to read the bill of lading or if the legal significance of its provisions were misrepresented. *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103, 108 (1st Cir. 1978). However, we find that United did not misrepresent the legal significance of its liability limitation provisions. Mr. Pavliga explained those provisions to Mrs. Hughes and gave her and Mr. Hughes the necessary documentation from which they could learn the exact nature of each liability limitation available to them. Plaintiffs also argue that they were not given a reasonable and fair opportunity to exercise their right to choose alternative insurance coverage. They point to the fact that Mr. Hindershott's memorandum instructed Mrs. Hughes as to how to fill in the liability limitation section. Such an argument misconceives the nature of the evidence at trial. Mr. Hendershott's instructions to Mrs. Hughes was based on Mrs. Hughes' conversation with Mr. Pavliga. Mrs. Hughes, not Mr. Hendershott, selected the liability limitation which governed the contract between the parties. Thus, *Allied Van Lines, Inc. v. McKnab*, 351 So.2d 344 (Fla. 1977), is inapposite to the case before the court. It may be that Mrs. Hughes misunderstood her conversation with Mr. Pavliga. She may have incorrectly perceived that she was obtaining full value coverage for her household goods which would be paid to her in the event of loss and that such full value coverage was available in return for a premium payment of $3.00 per pound. How-

ever, a unilateral mistake by Mrs. Hughes as to the amount of her coverage is not a valid basis to vitiate a liability limitation. *Cf. Feinberg v. Railway Express Agency*, 163 F.2d 998 (7th Cir.), *cert. denied*, 332 U.S. 847 (1948).

While we acknowledge that there are decisions in other circuits which, for various reasons, permit exceptions to the well established rule that liability limitations are valid, we do not believe that such exceptions, even if accepted in this circuit, would assist Plaintiffs. The evidence in this case is devoid of any fact or inference to suggest that United attempted in any way to mislead Plaintiffs. Plaintiffs accepted a limitation of liability of $3.00 per pound. We will not give them any more than they agreed to accept. Accordingly, judgment is entered on behalf of Plaintiffs and against Defendants pursuant to the agreement between the parties in the amount of $26,180 ($51,180 less the $25,000 already paid to Plaintiffs) plus interest and costs. Plaintiffs' claims for recovery on state court common law theories, including their punitive damage claim, are denied.

ENTER:

/s/ PAUL E. PLUNKETT
Honorable Paul E. Plunkett
District Court Judge

Dated: 3/27/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

EDWARD HUGHES, et al

v. Case Number: 84C 4367

UNITED VAN LINE, INC., et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Judgment is entered on behalf of plaintiffs and against defendants pursuant to the agreement between the parties in the amount of $26,180 ($51,180 less the $25,000 already paid to plaintiffs) plus interest and costs. Plaintiffs' claims for recovery on state court common law theories, including their punitive damage claim, are denied.

March 27, 1986
Date

H. STUART CUNNINGHAM
Clerk

/s/ THERESA B. KINNEY
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 4367 Date: 6-9-86
Name of Assigned Judge: Paul E. Plunkett
Case Title: Hughes -v- United Van Lines

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Motion to amend judgment and for a new trial, denied.

* * * * *

STATUTES INVOLVED

49 C.F.R. Section 1056.6(a), (b)(11)

§ 1056.6 Receipt or bill of lading.

(a) *Issuance of a receipt or bill of lading.* Every motor common carrier engaged in the transportation of household goods as defined in 49 CFR 1056.1(b)(1) shall issue a receipt or bill of lading. The bill of lading shall contain the minimum information required by § 1056.6(b) and the terms and conditions of the contract. The carrier shall furnish a complete copy of the bill of lading to the shipper prior to the commencement of the loading of a shipment.

(b) *Minimum information required on a receipt or bill of lading.* Whenever a receipt or bill of lading is issued in compliance with paragraph (a), the carrier shall cause to be included therein the following minimum information:

* * * * *

(11) The required released rates valuation statement.

49 C.F.R. Section 1307.201(c)

§ 1307.201 Released rates on household goods.

* * * * *

(c) *Statement on bills of lading.* The bill of lading issued for any shipment accepted for transportation and storage at released rates and charges established and maintained under authority of this order, shall have printed in distinctive color in boldface type on the face thereof a statement reading as follows:

Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater.

The release of value must be entered in the following form directly below and immediately following the foregoing statement, and must be completed only by the person signing it.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding _____

_____

(To be completed by the person signing below)

NOTICE: The shipper signing this contract must insert in the space above, in his own handwriting, either his declaration of the actual value of the shipment, or the words, "60 cents per pound per article." Otherwise, the shipment will be deemed released to a maximum value equal to $1.25 times the weight of the shipment in pounds.

_____

(Shipper)

_____

(Date)

Provided that, Where the shipper is the employer of the actual owner of the household goods being transported and is responsible for all transportation charges in connection with such a move, the shipper may instruct the motor carrier to release the shipment to a value of 60 cents per pound per article (a) by specification made on a purchase order, or (b) by issuing, in advance of the shipping date, appropriate letters of instructions to the carrier. In such instances, the motor carrier must incorporate the instructions by reference to the document in (a) or (b) above in the bill or lading in lieu of the personal signature and handwritten statement relating to released rates.

49 U.S.C. Section 11707

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the

property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d)(1) A civil action under this section may be brought against a delivering carrier (other than a rail carrier) in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(2)(A) A civil action under this section may only be brought—

(i) Against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) A civil action under this section may be brought in a United States district court or in a State court.

(C) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed,

provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1453; Pub.L. 96-258, § 1(14), June 3, 1980, 94 Stat. 427; Pub.L. 96-296, § 26(b), July 1, 1980, 94 Stat. 818; Pub.L. 96-448, Title II, § 211(c), Oct. 14, 1980, 94 Stat. 1911.)

49 U.S.C. Section 10103

§ 10103. Remedies as cumulative

Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1340; Pub.L. 96-448, Title II, § 214(c)(2), Oct. 14, 1980, 94 Stat. 1915.)

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No. 87-970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD and NANCY HUGHES,

Petitioners,

v.

UNITED VAN LINES, INC.,
and 291 SISSER BROS., INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Carmack Amendment to the Revised Interstate Commerce Act preempt state and common law remedies for loss or damage to interstate shipments.
2. Is there such a conflict between the circuits as to warrant certiorari.
3. Does the "material deviation" doctrine invalidate a liability limitation under the Carmack Amendment.
4. Is a carrier of household goods in interstate commerce to be held to a standard of strict compliance with applicable federal regulations.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In the Spring of 1982, petitioners Edward and Nancy Hughes moved their family from Medford, New Jersey to Chicago, Illinois, where Edward Hughes had accepted a new position of employment.

The arrangements for the movement of their household goods were made through Larry Haney, a friend of the Hughes and an employee of a United Van Lines agent located in Dallas, Texas. (R. 139). Haney had been involved in the arrangements for three prior Hughes moves in 1977, 1978 and 1981. (R. 120-123). Prior to 1977, the Hughes had moved on at least seven other occasions in connection with the employment of Edward Hughes. (R. 210).

Upon being contacted by the Hughes about the move from Medford, New Jersey to Chicago, Illinois, Larry Haney arranged for 291 Sisser Bros., Inc., a United Van Lines agent in New Jersey, to meet with the Hughes to plan the move to Chicago. United Van Lines is a Missouri corporation engaged in the business of common carrier of used household goods and other commodities in interstate commerce under authority of a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission. United conducts its business through an extensive agency structure whereby local agents render services and provide equipment and personnel under the direction of United and subject to and in conformity with the regulations of the Interstate Commerce Commission.

Cy Pavliga, a sales representative for 291 Sisser Bros., met with Nancy Hughes and conducted a survey of the items to be moved. (R. 258). Pavliga furnished Nancy Hughes with various I.C.C. prescribed explanatory pamphlets and discussed with her the manner in which the move would be performed (R. 261). Pavliga then completed the I.C.C. prescribed Estimated Cost of Services form (49 C.F.R. 1056.3) and explained to Nancy Hughes her right to declare a value for her goods and the liability assumed by the carrier based on that declared value. (R.

250-254). Nancy Hughes selected tariff prescribed full value protection with a maximum carrier liability of $3.00 per pound of the shipment weight. Based on the estimated shipment weight of 12,000 pounds, Nancy Hughes declared a value of $36,000 for the shipment. Pavliga specifically asked her whether she was satisfied that $36,000 would be an adequate value for the shipment and she answered in the affirmative. (R. 250-260). Nancy Hughes was given a copy of the estimate. (R. 124).

Subsequently, Nancy Hughes was sent an Order for Service form, also I.C.C. prescribed (49 C.F.R. 1056.5), together with a note requesting that she sign in two places and declare a shipment value. Nancy Hughes signed the Order for Service and inserted $3.00 per pound as her declared value for the shipment.

Following the loading of the shipment on June 25, 1982, petitioner Edward Hughes signed both the bill of lading and the inventory of the items shipped. (R. 220-223). Edward Hughes had signed bills of lading and inventories on numerous other occasions and he knew what he was signing. Even so, he signed the bill of lading in two places, one of which was the blank for the declared value. Although this omission literally would have limited United's liability to $1.25 per pound as stated on the bill of lading, United has conceded petitioners' stated intent to declare a value of $3.00 per pound.

When the shipment was weighed on board the vehicle, the weight was 17,060 pounds, or approximately 5,000 pounds in excess of the estimated weight. Because the Hughes had declared a value of $3.00 per pound, the declared value, and United's liability, were increased from $36,000 to $51,180.

While in transit on the Ohio Turnpike, a fire of undetermined origin occurred on board the moving van, and a substantial portion of the Hughes shipment was destroyed. (R. 196). The van was driven to a turnpike "oasis" where the fire was extinguished by the local fire department. United made arrangements for the handling and further transportation of the salvageable portion of the shipment with one of its local Ohio agents. (R. 208). Respondent United conceded its liability for the declared value of $51,180.

United paid the Hughes $25,000 and attempted to pay the balance of $26,180. However, petitioners rejected this offer of payment and, on May 21, 1984, filed suit for $111,848.31. Prior to the filing of the suit, the Hughes had received a total of $86,087.41 against loan receipts from their home insurers. Petitioners subsequently amended their complaint against respondents by adding eight state and common law counts and increasing the ad damnum for shipment loss and/or damage to $230,000, plus other amounts for various additional counts.

The case was tried to the bench, at which time respondents contested all of the essential allegations of the complaint, including the alleged value of petitioners' goods damaged and destroyed. The District Court held that the Carmack Amendment to the Revised Interstate Commerce Act preempts state and common law remedies and that the liability of respondents had been properly limited under the Act, and entered judgment for petitioners for the balance due on their declared value.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has consistently held that the Carmack Amendment to the (Revised) Interstate Commerce Act preempts state and common law remedies for loss of and/or damage to interstate shipments. The circuit courts have been virtually uniform in their allegiance to this precedent. Only the Tenth Circuit appears to have departed from this mandate. However, respondents submit that the Tenth Circuit deviation is more imagined than real, and does not constitute such a split among circuits as to invoke the certiorari discretion of the Supreme Court. Indeed, the recodification of the Interstate Commerce Act in 1978, at which time the "existing law" proviso was removed from the Carmack Amendment and placed in a separate section, may well render moot any perceived difference on the part of the Tenth Circuit. Finally, petitioners' claimed errors in the decision of the Seventh Circuit in the instant case are without foundation and, if acknowledged, would work to destroy the substance of the Carmack Amendment.

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT HAS CONSISTENTLY RULED THAT THE CARMACK AMENDMENT TO THE INTERSTATE COMMERCE ACT PREEMPTS STATE AND COMMON LAW REMEDIES FOR LOSS OF AND /OR DAMAGE TO INTERSTATE SHIPMENTS.

Seven years after the enactment of the Carmack Amendment to the Interstate Commerce Act in 1906, 49 U.S.C. 11707, the Supreme Court addressed the question of whether the Amendment preempts state and common law remedies for loss and/or damage to interstate shipments. *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 59 L.Ed. 1137 (1913). The specific issue addressed by the Court was whether it was the intention of Congress to permit shippers to rely upon any right of action against a carrier conferred by existing state law, pursuant to a proviso of the Carmack Amendment which stated:

> "Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

Alluding to the varied, inconsistent and often confusing patchwork of state regulation of carrier liability which was the cornerstone of Carmack, the Court responded to the claim by holding:

> "This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to." *Croninger* at 507.

Throughout the history of Carmack, some courts and litigants have noted that state regulation, as opposed to common law, was the preemption issue in *Croninger*. See *Wirth v. Silvretta*, 575 F.Supp. 1274 (N.D. Ill. 1984). However, in the 1906 case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U.S. 426, the Court construed a similar proviso in another section of the Interstate Commerce Act by ruling that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

Croninger cites, relies upon and adopts this rationale, so that it is unnecessary to indulge in inference with respect to *Croninger's* impact on common law remedies. The Court has made it abundantly clear that Carmack preempts both state regulation and common law causes of action.

The reasoning of the Supreme Court is further supported by the 1978 recodification of the Interstate Commerce Act, at which time the "proviso" was removed from the Carmack Amendment and placed in a separate section. 49 U.S.C. Sec. 10103. The recodification was specifically not intended by Congress to effect substantive change, and the removal of the proviso from Carmack accordingly was done with full knowledge of the Court's holdings in *Croninger* and *Abilene. Report of the Committee on the Judiciary, House of Representatives, Sept. 1, 1977.*

Petitioners in the instant case contend that the Seventh Circuit invalidated the proviso (49 U.S.C. Sec. 10103) by holding that it does not preserve a shipper's common law rights. However, the Seventh Circuit merely follows *Cron-*

inger, which found it impermissible and contrary to the intent of Congress for the proviso to destroy the act itself. Indeed, the decision of the Seventh Circuit (Petitioners' Appendix 1) makes it clear that the Supreme Court ruling in *Croninger* is consistent with other Supreme Court decisions inferring preemption intent where Congress has legislated so comprehensively as to fully occupy the field. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985).

Petitioners also contend that the Seventh Circuit decision erroneously holds that the purpose of the Carmack Amendment is to establish uniform federal guidelines for interstate shipments, when the purpose is to impose absolute liability on common carriers for loss or damage to a shipper's goods. As noted in all of the cases dealing with Carmack preemption, uniform regulation is precisely the basis for the enactment of Carmack. See *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357, 41 S.Ct. 114, 65 L.Ed. 301 (1920). One of the more articulate expositions of the reason for uniformity is contained in the case of *Southern Pacific Co. v. Crenshaw*, 5 Ga.App. 675, 687, 63 S.E. Rep. 865:

> "Some states allowed shippers to exempt themselves from all or a part of the common law liability by rule, regulation, or contract; others did not; the Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislation and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

Petitioners appear to argue that there is an inconsistency between uniform federal guidelines and full liability for actual loss or damage. In fact, these concepts follow one from the other. They are necessarily joined in purpose and each serves to justify the other. There is no conflict among the courts as to the basic purpose of the Interstate Commerce Act. In addition, petitioners' reliance on the First Cummins Amendment, Act of March 4, 1915, Ch. 176, Sec. 1, 38 Stat. 1196-97, is misplaced. Proper interpretation of the legislative history requires that the first Cummins Amendment of 1915 be read in conjunction with the 1916 Cummins Amendment (the "Second Cummins Amendment"), 39 Stat. 441 (1916).

The practical effect of the first Cummins Amendment of 1915 was to abolish the entire system of released rates based upon agreed valuation as opposed to actual value. To correct this, and to restore conformity with the tenor of Carmack as originally enacted, the second Cummins Amendment was enacted in 1916. This amendment again authorized carriers to limit their liability and the amount of recovery by the establishment of transportation rates under which the liability of the carrier is limited to a property value established by written declaration or by a written agreement. Sec. 49 U.S.C. Sec. 10730.

Thus, with the exception of the one year period between the two Cummins Amendments, carriers have always been permitted to limit their liability under Carmack where the shipper declares a value or agrees in writing to a released value for the property.

Contrary to the assertion of petitioners, a reading of the legislative history and the many cases in connection with the Carmack Amendment makes it clear that there is no confusion among the courts as to the purpose of Carmack. Moreover, the fact that the Carmack Amendment has historically permitted liability limitations is ample proof in and of itself that Congress did not intend that shippers have recourse to state and common law remedies.

II.

THERE IS NOT SUCH A CONFLICT BETWEEN THE DECISIONS OF THE CIRCUITS AS TO WARRANT CERTIORARI.

The principal basis for petitioners' request for writ is their claimed split among the circuits as to Carmack preemption. Petitioners allege that the Second, Sixth, Eighth, Ninth and Tenth Circuits stand in contrast to the decision of the Seventh Circuit in the instant case. However, with the exception of the Tenth Circuit, there is no substantive split among the circuits—and the perceived split by the Tenth Circuit is more imagined than real.

Petitioners' Second Circuit case involves the validity of an arbitration clause in a bill of lading which the court invalidated precisely because of its lack of conformity with the Interstate Commerce Act. *AAACON Auto Transport v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648 (2nd Cir. 1976), *cert. denied* 429 U.S. 1042 (1977). The Sixth Circuit holds that Carmack preempts, *W.D. Lawson & Company v. Penn Central Company*, 456 F.2d 419 (1972), and the case relied upon by petitioners does not question the preemption doctrine. *Marquette Cement Manufacturing Co. v. Louisville and Nashville Railroad Co.*, 406 F.2d 731 (1969). The Eighth Circuit rules that suits against interstate carriers are governed by the Carmack Amendment. *R.H. Fulton v. Chicago Rock Island and Pacific Railroad Company*, 481 F.2d 326 (1973). Petitioners' cited precedent was decided under the Carmack Amendment and it does not imply disagreement with the Seventh Circuit in the instant case. *Caspe v. AAACON Auto Transport, Inc.*, 658 F.2d 613 (1981). Petitioners' Ninth Circuit case involves a jurisdictional issue under the removal statute and does not indicate that that circuit would rule against Carmack preemption. *Hunter v. United Van Lines*, 746 F.2d 635 (1984), *cert. denied* 474 U.S. 863 (1985).

Although the Tenth Circuit is generally regarded as holding against Carmack preemption, such a conclusion is not altogether clear from a reading of its cases. The Tenth Circuit "conflict" appears to emanate from its decision in the 1971 case of *Litvak Meat Company v. Baker*, 446 F.2d 329. *Litvak* involved a rather unique factual circumstance in that the shipper filed suit against two participating carriers—a railroad and a trucking company. However, because venue under the Carmack Amendment did not lie against the railroad in Colorado, the district where the suit was brought, the Tenth Circuit held that the shipper could proceed against the railroad on a cause of action for negligence. The Circuit Court accordingly permitted the shipper to proceed against the trucking company under the Carmack Amendment and against the railroad for common law negligence.

The rationale employed by the court was that the Carmack Amendment was in any event a codification of the common law and that, although a common law action sounding in negligence requires that the shipper demonstrate damage caused by a specific carrier, there is no reason why a shipper should not be permitted to avail himself of that route if he so chooses. Respondents submit that there is nothing enigmatic about the Tenth Circuit ruling. It represents an understandable effort by the court to prevent the vagaries of venue from forestalling resolution of a just claim. More important, it is not authority which would permit unlimited state and common law causes of action. The decision is limited to a cause of action for common law negligence, and only because the Carmack Amendment is a codification of the common law rule which allowed recovery for negligence.

In support of its position, the court cited its earlier decision in *L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488 (1964), in which it stated that "the Carmack Amendment thus does not change the common law rule" and that it "continues in effect the common law applicable to the liability of carriers". However, this proposition was in explanation of the shipper's burden of proof and allowable damages under both the Carmack Amendment and common law. There is not a scintilla of indication that *Carmack* does not preempt state and common law remedies other than those embraced within the codification. Although *Litvak* appears to bootstrap the *Whitlock* opinion in order to overcome the venue defect as to the railroad, it did not propose to extend its holding beyond that which was folded into Carmack by the codification of the common law rule.

Petitioners offer the case of *Reed v. AAACON Auto Transport, Inc.*, 637 F.2d 1302 (1981), as a Tenth Circuit decision purportedly demonstrating that Circuit's holding

that Carmack does not preempt common law causes of action. However, the issues in that case were essentially limited to recoverable damages. As to the liability limitation asserted by the carrier, the court correctly held that it was void because the carrier failed to maintain transportation rates dependent upon declared shipment value, as required by Carmack. The *Reed* court also acknowledged the recoverability of punitive damages, erroneously relying on a Fourth Circuit case that was not a Carmack case in the first instance. *Hubbard v. Allied Van Lines, Inc.*, 540 F.2d 1224 (1976). *Reed* appears to be a single exception to the rule that punitive damages are not recoverable under Carmack. See *Chandler v. Aero Mayflower Transit Company, Inc.*, 374 F.2d 129 (4th Cir. 1967). Moreover, it is questionable whether *Reed* would have considered the punitive damage issue if the asserted liability limitation had been upheld under Carmack.

In any event, since the 1978 removal of the "existing law" proviso to another section of the Act, it appears that no court has applied the proviso to the Carmack Amendment, and respondents accordingly submit that there is presently not such a conflict among the circuits as to warrant certiorari by the Supreme Court.

III.

MATERIAL DEVIATION IS NOT A BASIS FOR INVALIDATING A LIABILITY LIMITATION UNDER THE CARMACK AMENDMENT.

The courts generally agree that only fraud will vitiate an agreement to limit liability under Carmack. *Southeastern Express Co. v. Pastime Amusement Co.*, 229 U.S. 28, 57 S.Ct. 73, 81 L.Ed. 20 (1936). However, as pointed out by petitioners, there is a line of state cases which have invalidated liability limitations where there was a material

or fundamental and unjustified deviation from the shipping agreement as to the mode or manner in which the shipped goods or articles were packed, stowed or transported, if the same caused the shipment injury.

Thus, the failure of a carrier to perform special protective packing for electronic equipment, for which the shipper paid an additional charge, rendered a liability limitation ineffective as to that equipment. *Johnson v. Bekins Moving & Storage Co.*, 389 P.2d 109 (Idaho 1963), *cert. denied* 379 U.S. 913 (1964). And the loss of goods in a fire on a moving van caused by the carrier's loading on the van of a highly volatile substance was grounds for invalidating a liability limitation where the substance caused the fire. *Seetapun v. Illinois-California Express, Inc.*, 518 P.2d 885 (Okla. 1973).

However, these "material deviation" cases have been expressly overruled by the federal courts. *Rocky Ford Moving Vans, Inc. v. United States*, 501 F.2d 1369 (8th Cir. 1974); *Conoco, Inc. v. Andrews Van Lines, Inc.*, 526 F.Supp. 722 (U.S. D.C. Okla. 1981); *Sorenson-Christian Industries, Incorporated v. Railway Express Agency, Incorporated*, 434 F.2d 867 (4th Cir. 1978). The material deviation doctrine therefore has been rejected by the federal judiciary and, even if it had not been so overruled, the facts of the instant case would not give rise to liability under that doctrine. Respondents' conduct in the instant case was exhaustively examined by the District Court, and there were no findings of fire cause, shipment abandonment, theft by respondents' employees or any of the other matters charged by petitioners.

IV.

CARRIERS SHOULD NOT BE HELD TO A LEVEL OF STRICT COMPLIANCE WITH FEDERAL REGULATIONS.

Petitioners contend that respondents did not strictly comply with the applicable regulations governing the form and content of the bill of lading. 49 C.F.R. Sec. 1056.6(a) and (b); 49 C.F.R. Sec. 1307.201(c). They therefore argue that any liability limitation contained in the bill of lading is invalid.

Both the District Court and the Seventh Circuit earnestly considered petitioners' contentions and concluded that respondents had adequately complied with the regulations and that petitioners had suffered no harm traceable to the shipment documentation.

Petitioners quote the case of *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), out of context. *Anton* did not deal with the content or format of shipment documentation. The *Anton* decision focused on the carrier's failure to issue its bill of lading, a necessary element for the limitation of liability under Carmack. The controlling law as to tariff and regulation compliance is set forth in the decision of the Seventh Circuit in the instant case. *Robinson v. Ralph G. Smith, Inc.*, 735 F.2d 186 (6th Cir. 1986). Although *Robinson* follows the substantial compliance rule, the Seventh Circuit concluded that the facts of the case before it were such that it was not necessary to determine whether it should adopt the rule. The record is clear that respondents complied with the regulations and that petitioners were in no manner injured by any aspect of the regulations governing shipment documentation.

CONCLUSION

The District Court and the Court of Appeals for the Seventh Circuit have correctly applied the law to the facts of this case. There is no question as to their understanding of the purpose of the Carmack Amendment or their interpretation of Supreme Court authority. Throughout the course of this litigation, petitioners have consistently attempted and failed to prove egregious conduct on the part of respondents. Respondents respectfully submit that none of the questions raised by petitioners, including the alleged split among circuits, should be sufficient to warrant certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

EDWARD HUGHES ET UX. *v.* UNITED VAN LINES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87-970. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting:

The Court of Appeals for the Seventh Circuit held in this case that the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. § 10103, bars a shipper from pursuing state and common law remedies against a carrier for damages to goods shipped in interstate commerce. The court reasoned that the Act was designed to establish "uniform federal guidelines" that would "remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment." 829 F. 2d 1407, 1415 (1987). The congressional intent to eliminate such uncertainty would be defeated, said the court, if shippers were allowed to choose among federal, state, and common law remedies. The court's decision relied in large measure on *Adams Express Co.* v. *Croninger*, 226 U. S. 419 (1913), which construed an earlier version of the Carmack Amendment as preempting state regulation of carrier liability.

The court recognized that its view of the preemptive scope of the Carmack Amendment was shared by three other circuits. See 829 F. 2d, at 1414 (citing *Air Products & Chemicals, Inc.* v. *Illinois Central Gulf R. Co.*, 721 F. 2d 483, 484–485 (CA5 1983), cert. denied, 469 U. S. 832 (1984); *Fulton* v. *Chicago Rock Island & Pacific R. Co.*, 481 F. 2d 326, 331–332 (CA8), cert. denied, 414 U. S. 1040 (1973); *W. D. Lawson & Co.* v. *Penn Central Co.*, 456 F. 2d 419, 421 (CA6 1972)). The court noted that a divergent position had been taken by the Tenth Circuit, however, in *Reed* v. *Aacon Transport, Inc.*, 637 F. 2d 1302, 1304–1305 (1981); *Litvak*

Meat Co. v. *Baker*, 446 F. 2d 329 (1971); and *L. E. Whitlock Truck Service, Inc.* v. *Regal Drilling Co.*, 333 F. 2d 488 (1964). For example, the *Litvak* court held that the Carmack Amendment "did not oust all other remedial rights of shippers" against interstate carriers. 446 F. 2d, at 337.

Accordingly, because a conflict exists among the circuits concerning the preemptive scope of the Carmack Amendment, I would grant certiorari.